IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

Civil Action No.: HBA 20 of 2016

BETWEEN : **BABITA KUMAR and SANJAY SINGH VERMA both of Raralevu, Nausori**

APPELLANT

AND : **SUNIL KUMAR of Koni Lane, Davuilevu, Nasinu**

RESPONDENT

Counsel : **Mr. M. Young for the Appellants**

Mr. S. Kumar for the Respondent

Date of Hearing : **30 November, 2016 (9.30 am)**

Date of Judgment : **30 November, 2016(3.30 pm)**

JUDGMENT

INTRODUCTION

1. The Appellant-Plaintiff (the Plaintiff) had filed this appeal against the ruling of Resident Magistrate delivered on 8th June, 2016. The Resident Magistrate had refused an application by the Plaintiff to reinstate the action. The Learned Resident Magistrate had struck off the action due to non-appearance of the Plaintiff on 7th December, 2015. The matter was earlier struck off but was reinstated on the same day when the lawyer Mr. T. Sharma had appeared late on the same day, but this time even the application for reinstatement was filed one month after the striking out. The Learned Resident Magistrate exercised her discretion in refusing to reinstate the matter.

2. Grounds of Appeal are as follows

    1. That the learned Magistrate erred in law and in fact when she failed to properly analyze the contents of the affidavit of Dorin Monisha Devi.

2. That the learned Magistrate erred in law and in fact when she wrote in her Ruling that the Appellants office could have written to inform the clerks of their difficulty when the Learned Magistrate of court (sic) does not entertain correspondence to have matters stood down.

3. That the learned Magistrate erred in law and in fact when she stated in the ruling that the Appellants solicitors office (sic) could have informed the clerks to have the matter stood down to allow Ms. Karan to appear when Ms. Karan had informed the Appellants solicitor's office (sic) that she won't be able to appear in matters before the learned Magistrate.

4. That the learned Magistrate erred in law for not recusing herself from hearing the reinstatement application as the Appellant/Plaintiff was a client of the firm that the Learned Magistrate was previously employed with especially since the learned Magistrate was in charge of handling the Appellant/Plaintiff's file.

PRELIMINARY ISSUE

3. At the hearing of this Appeal the Respondent–Defendant (the Defendant) raised a preliminary issue. He said that there was non-compliance of Order XXXVII rule 1 of the Magistrate's Court Rules (Cap14) by the Plaintiff. He said that the Notice of Intention to Appeal was not given to him. I could not find anything to the contrary of the said submission in the record and the counsel for the Plaintiff did not reply to said preliminary objection. Order XXXVII rule 1 of the Magistrates' Court states as follows;

> *'1. Every appellant **shall within seven days** after the day on which the decision appealed against was given , give to the **respondent** and **to the court by which such decision was given** ....notice in writing of his intention to appeal.*
>
> *Provided that such **notice may be given verbally** to the court in the presence of the opposing party immediately after judgment is pronounced.'(emphasis added)*

4. I have perused the record of the court below and there was nothing to indicate that Plaintiff had exercised the proviso to the said *rule 1*, quoted above. Hence it is imperative that the Notice of Intention to Appeal should be given to the Respondent as well as to the court within 7 days from the decision appealed. There is no evidence of Respondent had

given Notice of Intention to Appeal at all. So, this Appeal can be dismissed *in limine* without considering merits for non-compliance of the said rule. Considering the history of this case I would not do it without considering the merits of the appeal. It would not have been a difficult thing to verbally give notice upon the delivery of the ruling as counsel for the Plaintiff was present in court at the time of delivery of the ruling on 7th December, 2016.

5. Even if I am wrong, on the preliminary issue, I would like to deal with the Grounds of Appeal briefly in the following manner.

Ground 1

6. When the matter was struck off for want of prosecution by the Learned Resident Magistrate, the Plaintiff made an application for reinstatement of the same. For the said application for reinstatement an affidavit in support from a Law Clerk named Dorin Monisha Devi was filed (see page 17 of the Appeal Record). It is noteworthy to see what was sworn on the said affidavit. In paragraph 2 deponent states as follows;

> *'That I depose to the facts herein as within my own knowledge and from information derived from the file of the Plaintiff held with this firm and from my personal attendance to matters pertaining to this file* ***and from instructions by my Principal Solicitor, Mr. Tirath Sharma of this firm.'***

7. From the above quoted paragraph the facts deposed were even from the instructions by a lawyer, which is hearsay. I do not see what weight can be attached to such an affidavit. It should have been struck off for non-compliance of Order 41 rule 5(2) of High Court Rules of 1988. If the deponent relied on some source for a particular fact averred the said source and ground for such belief should be revealed. Also see the decision of Justice Gates (as his lordship then was) in ***Chandrika Prasad v Republic of Fiji and AG*** (2001) 2 FLR 39.

8. Even if I am wrong on the above, the proper analysis of the affidavit of said Dorin Monisha Devi would reveal the following

i. The deponent states that Mr. Tirath Sharma was sick on the day matter was fixed for hearing. If so at least there should be a medical certificate from an acceptable person who could recommend rest on that day. This objection was raised in the affidavit in opposition filed in the court below but no reply was filed to the said affidavit in opposition. The deponent in the paragraph 4 state Mr. T. Sharma was not well. The source or belief for such finding including reason for such a conclusion were not mentioned. (see the decision of Justice Gates (as his lordship then was) in ***Chandrika Prasad v Republic of Fiji and AG*** (2001) 2 FLR 39

ii. In the paragraph 5 she stated that 'we gave instructions' but there is only one deponent to the affidavit. This again is not in accordance with the High Court Rules. In any event there is no evidence of the receipt or acceptance of such request by another lawyer to appear on that day. (See Order 41 rule 1(4) and Order 41 rule 2 of High Court Rules of 1988)

iii. If there was no person to appear since it was hearing and Plaintiffs would have been the first witnesses and one of them would have come to the court to inform that the solicitor was indisposed.

iv. In the affidavit in opposition filed in the court below the Defendant had taken the objection that there was lack of evidence of acceptance of the alleged fax requesting another lawyer to present when the matter was called to inform the non availability of Mr. T. Sharma. Again there was no reply to said objection. An affidavit from that lawyer who accepted or another communication from her would have served the purpose. Even though there was an opportunity for such a reply it was not utilized, indicating serious doubts as to the contents of such facts.

v. If the lawyer who initially accepted had difficulty in attending at the time at least the opposing lawyer should have been informed but there is no such evidence.

vi. If the lawyer could not attend to the court in time due to unavoidable circumstances (which is not the case in this instance in the court below) at least within the same day as soon as when it was possible it should have been brought to the notice of the Resident Magistrate. This was not done in this case. It is important to note that the Plaintiff had done this previously on the same day and the striking out was set aside and reinstatement was done.

vii. Though the Learned Resident Magistrate stated that there was no delay in the application for reinstatement, in her exercise of discretion, I could not agree with that. The solicitor who was aware of hearing date would have known the outcome of his non appearance on the same day. At least the law clerk would have known and possibly informed him. I do not have any evidence that how many days Mr. T. Sharma was sick and what was the sickness. So I assume that he was well on the next day and would have made preparations to file an application for reinstatement immediately. But the application for reinstatement was filed nearly one month after striking out on 4.01.2016. No explanation was given as to the delay.

viii. Last not least there is no date of the said affidavit of Dorin Monisha Devi and number of other deficiencies in the jurat of the affidavit which I do not want to address in this appeal.

9. The Learned Resident Magistrate in her Ruling had not considered all the deficiencies but was right when she stated 'I do not find this to be good enough reason for nonappearance .....'. So there is no merit in the Ground 1.

Ground 2

10. Each court may have its own procedure as to deal with the correspondence with the lawyers and I cannot see anything wrong in her approach. If they knew that the Resident Magistrate does not entertain any correspondence, that would have been a reason to be cautious and to request one of the Plaintiffs to be present in court to inform the non-availability of the lawyer. Since it was a date of hearing the parties would have made arrangements to be present in court to give evidence/instructions. As it seems there was no communication from the Plaintiff's lawyers that he could not appear on or before the hearing. This ground has no merits, too.

Ground 3

11. According to the affidavit in support of the reinstatement application the reason for the non-appearance of another lawyer was that she could not be present on time. If so, surely the matter would have been called later if such difficulty was explained. These are again

certain methods each Magistrate exercise considering the heavy workload of a Magistrate. I cannot see any merits in that ground too.

Ground 4

12. This is totally unfounded and unreasonable allegation against the Learned Magistrate. Why they wait all this time to take up an objection on recusal is most strange and should be rejected and lacked merit. If she had appeared for the Plaintiff before she joined to the bench, this objection would have been taken at the outset when the matter was seized with her. This matter was seized with the said Resident Magistrate for nearly one year before the matter was struck off. If the Plaintiff thought of any conflict there was ample time for such application for recusal this is most unsuitable manner to take such objection. This ground has no merits.

CONCLUSION

13. Considering the circumstances I cannot see the learned Resident Magistrate had either erred in law or fact in her ruling delivered on 8th June, 2016. The decision is affirmed. The perusal of the record would indicate the most unsatisfactory manner in which the parties had appeared in the court below. The Learned Resident Magistrate had exercised her discretion properly. The cost of this appeal is summarily assessed at $750.

FINAL ORDERS

a. The Appeal dismissed.

b. The Appellant is ordered to pay a cost of $750 as cost of this appeal.

Dated at Suva this 30th day of November, 2016

HIGH COURT OF FIJI
SUVA

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Justice Deepthi Amaratunga
High Court, Suva